LIBRARY
SUPREME COURT, U.S.

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 1081

WALTHAM PRECISION INSTRUMENT COMPANY, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

The Federal Trade Commission brought this proceeding to prevent false and deceptive advertising, in violation of Section 5 of the Federal Trade Commission Act, in connection with the distribution of watches (App. 1–6, 9–14).[1] The misrepresentations

[1] Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45, provides in pertinent part:

"(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

* * * * * * *

"(a)(6) The Commission is empowered and directed to prevent persons * * * from using unfair methods of competition

738-519

charged to petitioners related to the use (a) of the widely-known trade name "Waltham" to give the impression that the watches were made entirely in the United States, and (b) of a device containing eight synthetic stones to give the impression that 17-jewel watches were in fact 25-jewel watches.

In 1956 petitioners Joseph and Melvin Axler, and others associated with them, acquired control of the Waltham Watch Company, a Massachusetts corporation which had been in the watch business for many years. Joseph and Melvin Axler became respectively president and vice-president, and members of the board of directors, of the corporation. In the same year, the corporation licensed Hallmark, Inc., to use the name "Waltham" on watches sold by it in the United States (Pet. 61–62).

In 1957, the Massachusetts corporation changed its name to the Waltham Precision Instrument Company, Inc., and transferred its watch business to a newly organized Delaware corporation. The Delaware corporation assumed the name of Waltham Watch Company and the Axlers became officers and directors of the Delaware corporation (Pet. 62). Two years later, the Waltham Watch Company of Delaware was merged with Hallmark, Inc., under the name of Waltham Watch Company. At this time the Axlers terminated their association with the company (*ibid.*).

The instant proceeding was brought in 1957 against Waltham Watch Company, the Axlers, and several

---

in commerce and unfair or deceptive acts or practices in commerce."

"App." refers to the "Appendix to Petitioner's Brief" in the court of appeals.

others (App. 1–6).[2] After an administrative hearing, the Commission held that the record "compelled" the examiner's finding that petitioners had used "the old and famous American name 'Waltham' * * * repeatedly in various ways to mislead the public into believing that the old Waltham firm is still manufacturing all parts of its watches in the United States" (Pet. 55), when in fact the movements of the watches sold under the "Waltham" name were not made in the United States at all, but were imported from abroad (Pet. 56).

With respect to the charge that petitioners falsely represented that their 17-jewel watches contained 25 jewels, the Commission found as follows: The "Waltham" watches contained 17-jewel movements imported from Switzerland to which petitioners added a so-called "Resevoil" device containing 8 additional synthetic stones. Only the 17 jewels come in contact with any other moving parts at points of wear. The 8 stones in the "Resevoil" device, which petitioners claimed reduced friction by retaining oil and distributing it to the bearings over which they are located, do not come in contact with any moving parts at points of wear. Petitioners' contention that it is nevertheless not deceptive to represent the stones contained in the "Resevoil" device as jewels, was identical, the Commission found, to the contention it had rejected in *Allen V. Torneck Company*, 55 F.T.C. 1770. In that case, the Commission pointed out, it had

[2] An Amended and Supplemental Complaint was filed in March 1958, adding Waltham Precision Instrument Company as a defendant (App. 9-14).

found that the industry recognizes a jewel as a small, hard, highly processed gem placed in a watch movement to come in contact with a moving part at a point of wear, and that to qualify for the term "jewel" it is not enough that the "Resevoil" stones serve some useful function—they must perform the function with which the word "jewel" has long been associated (Pet. 49–51). The order in *Tornek* was affirmed in a *per curiam* opinion, 276 F. 2d 513 (C.A.D.C.), rehearing denied, *ibid.*, certiorari denied, 364 U.S. 829, rehearing denied, 364 U.S. 906.[3]

The Commission concluded that "[t]he testimony and other evidence in the present proceeding serve only to corroborate the meaning of the term 'jewel' which the Commission found in *Tornek*: and, in any event, are sufficient in themselves to support the examiner's finding" (Pet. 53).[4] Accordingly, the Commission upheld the examiner's finding that petitioners' representation of the stones in the "Resevoil" device as "jewels" was deceptive.

The Commission also concurred in the examiner's finding that the Axlers and the Massachusetts corpo-

---

[3] The Commission regarded as immaterial certain factual differences between the instant case and *Tornek*. It said (Pet. 50):

"Although the 'Resevoil' device in *Tornek* was covered by an earlier patent and contained only four synthetic stones, they were located in the same places over the wheel bearings of the watch and were claimed to have the same lubricating function as the eight stones in the 'improved' device."

[4] The Commission also pointed out that *Tornek* was not the first time that it had considered the term "jewel" in the advertisement of watches. The same definition of jewel had been adopted in cases going back to the middle of the 1920's (Pet. 51, n. 2).

ration were properly made subject to the cease and desist order, since "[m]ost of the advertising and labeling in the record in this proceeding was disseminated during the existence of the Massachusetts corporation as the Waltham Watch Company, and while this company was controlled by the Axlers who served as its chief executive officers" (Pet. 49).

The court of appeals affirmed the order of the Commission (Pet. 65).

1. With a single exception noted below, there is no issue here which was not presented either in *Waltham Watch Co.* v. *Federal Trade Commission*, No. 495, this Term, certiorari denied, 375 U.S. 944, rehearing denied, 375 U.S. 998, or in *Tornek* v. *Federal Trade Commission*, No. 282, O.T. 1960, certiorari denied, 364 U.S. 829, rehearing denied, 364 U.S. 906. Each of petitioners' contentions with respect to the finding of deception in the use of the trade name, "Waltham" was presented in *Waltham* (the deception there related to clocks rather than to watches), and the issues urged by petitioners as arising out of the finding of deception in advertising the stones contained in the "Resevoil" device as "jewels" were presented in *Tornek*. The reasons which led to the denial of the petitions in those cases are equally applicable here, and we refer the Court to our memorandum in opposition in *Waltham* and our brief in opposition in *Tornek*.

2. The one issue not presented in those cases is the contention that, because Waltham Precision Instrument Company is no longer in the watch business

and the Axlers have had nothing to do with the Waltham Watch Company since 1959, it was error to make them parties to the order, even though most of the misrepresentations were made by the Massachusetts corporation while under the Axlers' control (Pet. 49). Since, however, the record is not clear whether Waltham Precision has agreed never to sell watches under the "Waltham" name (App. 29) and since there is no assurance that neither Waltham Precision nor the Axlers will return to the watch business, the court below correctly held that the Commission acted within its discretion in fashioning the order to protect the public against future deception (Pet. 64–65). *Keasbey & Mattison Co.* v. *Federal Trade Commission*, 159 F. 2d 940, 951 (and case cited) (C.A. 6); *Standard Container Mfrs.' Ass'n* v. *Federal Trade Commission*, 119 F. 2d 262, 265 (C.A. 5). As the court stated in *Standard Containers*, 119 F. 2d at 265, "if these petitioners are really out of [the] business to stay, they can take no harm from it."[5]

[5] Petitioner Waltham Watch Company also complains that the entry of the two orders against it—the one in No. 495, *supra*, and the one in the instant case—is "redundant, confusing, and * * * constitutes administrative harassment" (Pet. 30). Petitioner, however, had adequate opportunity to raise this issue before the Commission (App. 38, 39, note), but failed to do so (App. 52–59). Quite apart from the fact that it also failed to raise the issue in its petition for review in the court below (App. 170–174), petitioner is foreclosed from raising it now by the settled rule that issues not raised before an administrative agency are not open before the reviewing court. *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411, 414; *United States* v. *Tucker Truck Lines*, 344 U.S. 33, 37.

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
ROBERT B. HUMMEL,
IRWIN A. SEIBEL,
Attorneys.

JAMES MCI. HENDERSON,
General Counsel,
J. B. TRULY,
Assistant General Counsel,
LOUIS RUSSELL HARDING II,
Attorney,
Federal Trade Commission.

JUNE 1964.